

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 40 OF 2022-23

BETWEEN

M/S EMIRATES NATIONAL GROUP LLC.....APPELLANT

AND

DAR RAPID TRANSIT AGENCY.....RESPONDENT

DECISION

CORAM

- | | |
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| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 3. Ms. Violet Llimilabo | - Senior Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Daudi Ramadhani | - Advocate - Partner -Rex Advocates |
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FOR THE RESPONDENT

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| 1. Ms. Dornina Madeli | - Head of Legal Services |
| 2. Mr. Silla Okumu | - Ag. Head of Procurement Management Unit |

3. Ms. Mwantumu Saum - CS - National Development Corporation
4. Mr. Deusdedit Casmir - Director of Finance
5. Mr. Philemon Mzee - Director of Operations and
Infrastructure Management
6. Ms. Scholastica Ndilanha - Procurement Officer
7. Ms. Halima Kandoro - Legal Officer

This Appeal has been lodged by **M/S Emirates National Group LLC** (hereinafter referred to as "**the Appellant**") against **DAR Rapid Transit Agency** commonly known by its acronym as "DART" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/053/2018/2019/NC/06 for Procurement of Service Provider for Supply, Operation and Maintenance of Buses for DART System Phase 1 (hereinafter referred to as "**the Tender**"). Background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows: -

On 16th July 2021, the Respondent issued a Request For Proposal ("**RFP**") to four shortlisted tenderers. Deadline for submission of technical and financial proposals was initially set on 22nd October 2021 and was later on extended to 12th November 2021. Two tenderers namely; M/s Emirates National Group LLC and M/s City Carriers Limited submitted their technical and financial proposals as required. The Respondent formed an Evaluation Committee which conducted evaluation of the technical proposals in two stages, preliminary and detailed. After completion of the evaluation

process, the technical proposal submitted by M/s City Carriers Limited scored 67 points below the minimum pass point of 70 while the Appellant scored 77 points, hence it qualified for the financial evaluation stage.

On 16th December 2021, the Respondent informed the Appellant of the results of the technical proposals and the date of opening of its financial proposal which was set on 23rd December 2021. The financial proposal was opened on the scheduled date. Upon completion of evaluation, the Evaluation Committee recommended an award of the contract to the Appellant subject to pre- contract negotiations.

On 20th January 2022, the Appellant and the Respondent had a bid clarification meeting whereby several issues pertaining to the Tender were discussed and clarified. On 25th March 2022, the recommendation of awarding the Tender to the Appellant was tabled before the Tender Board. The Tender Board approved the recommendations subject to negotiations. According to the Respondent, negotiations successfully took place on 17th and 18th June 2022.

On 29th August 2022, the Respondent issued a provisional award letter to the Appellant. The award letter informed the Appellant that the intended contract price of TZS 5,540.00 VAT exclusive per kilometer for a total kilometer travel of 178,431,930 in twelve (12) years was subject to final revised financial model that would be concluded following the final amendment of technical specifications.

On 31st August 2022, the Respondent invited the Appellant to attend the signing ceremony between the parties scheduled to take place on 5th

attached to this Appeal as one of the requisite requirements. According to Rule 10(3) (a) of the Public Procurement Appeals Rules, GN. No. 411 of 2014 as amended in 2017 (hereinafter referred to as "**Appeals Rules**"), a copy of the decision issued by the Respondent's Accounting Officer should be attached with the statement of appeal.

Consequently, the Respondent prayed for dismissal of the Appeal as it has been pre-maturely filed before the Appeals Authority.

REPLY SUBMISSIONS BY THE APPELLANT ON THE PO

In response to the PO, Mr. Daudi Ramadhani, learned counsel for the Appellant commenced his submissions by pointing out that, it is an undisputed fact that Section 8 of the RFP provides guidance on dispute resolution procedures for the Tender. According to Section 8.3 of the RFP a tenderer who is dissatisfied with the Tender process should submit its complaint to the procuring entity, in this case the Respondent.

The learned counsel submitted that, upon receipt of the Respondent's letter dated 30th March 2023 and being dissatisfied, the Appellant filed application for administrative review to the Respondent through a letter dated 3rd April 2023. The said application was filed within seven working days as per Section 8.2.1 of the RFP. The Appellant contended that its letter dated 3rd April 2023 contained all the requisite requirements as provided for in Section 8.3.2 of the RFP. It was therefore, the application for administrative review.

Having properly filed the application for administrative review, the Appellant expected to receive the Respondent's decision thereof. To the

contrary, the Appellant received a letter dated 11th April 2023 which maintained the Respondent's position contained in the letter dated 30th March 2023. The Respondent's letter therefore was not a decision. In the circumstances the Appellant took it that the Respondent failed to issue the decision within the prescribed time.

The learned counsel submitted that Section 8.4.2 of the RFP allows a tenderer who has not received the procuring entity's decision on its application for administrative review to file an appeal to this Appeals Authority. Under such premises the Appellant lodged this Appeal. Thus, the Appeal is properly before the Appeals Authority. The learned counsel therefore prayed that the PO be overruled.

On its brief rejoinder the Respondent insisted that it never received any application for administrative review from the Appellant which complied with the requirements of Section 8.3.2 of the RFP. Therefore, the Respondent could not have issued a decision in the absence of a proper application for administrative review.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeal has been lodged pre-maturely before the Appeals Authority.

The Appeals Authority reviewed the record of appeal and observed that, the disputed Tender was conducted in accordance with the PPP Act and the PPP Regulations. Section 8 of the RFP contained procedures for dispute resolution. Specifically, Sub-section 8.2.1 and 8.3.2 state that if a tenderer

is dissatisfied with the Tender process it should submit its application for administrative review to the Respondent.

Sub section 8.2.1 and 8.3.2 of the RFP read as follows:-

"8.2.1 The bidder must submit an application not later than 7 (seven) working days after the Bidder became aware, or should have become aware of the circumstances giving rise to the complaint or dispute."

"8.3.2 The application for administrative review to the Chief Executive Officer of the Agency shall include:-

- (a) Details of the procurement requirements to which the complaint relates;*
- (b) Details of the provisions of the act, regulation or provision that has been breached or omitted;*
- (c) An explanation of how the provisions of the act, regulation or provision has been breached or omitted, including the dates and name of the responsible public officer, where known;*
- (d) Documentary or other evidence supporting the complaint where available; and*
- (e) Remedies sought and any other information relevant to the complaint."*

The above quoted sub section state clearly that a tenderer who is aggrieved with the tender process is required to submit its application for

administrative review to the Respondent within seven working days. The application for administrative review must comply with the requirements listed under Sub section 8.3.2 of the RFP.

The Respondent's letter dated 30th March 2023, informed the Appellant that in view of the fact that the Agreement remained unexecuted and extended signing term has expired, the Appellant was considered to have withdrawn from the Tender process. On 3rd April 2023, the Appellant responded. Looking into the contents of the Appellant's response letter and since there is no prescribed form in the RFP, the Appeals Authority is of the settled view that the Appellant's letter contained the details required under Sub section 8.3.2 of the RFP.

In view of the above observations, the Appeals Authority declines the Respondent's proposition that the Appellant's letter dated 3rd April 2023, was not the application for administrative review.

It is also apparent that upon receipt of the Appellant's letter dated 3rd April 2023, the Respondent replied through a letter dated 11th April 2023. Both the Appellant and the Respondent contended that this letter is not a decision. Respondent's decision is governed by Sub section 8.4.1 of the RFP. Sub section 8.4.1 of the RFP reads as follows:-

"8.4.1 The Chief Executive Officer of the Agency shall, within 14 (fourteen) days after receipt of the complaint or dispute, deliver a written decision which shall indicate:

- (a) Whether the application is upheld in whole, in part or rejected;*
- (b) The reasons for the decision; and*

(c) Any corrective measures to be taken".

In view of the above quoted provision, the Appeals Authority finds that the Respondent's letter dated 11th April 2023 constitutes a decision capable of being appealed against to this Appeals Authority.

In the upshot, the PO is overruled and the Appeals Authority proceeds to determine the Appeal on merit.

SUBMISSIONS BY THE APPELLANT ON THE MERITS

The learned counsel for the Appellant commenced his submissions by stating that the Appellant successfully participated in the Tender. The Appellant was issued with a provisional award letter after being found to have complied with the requirements of the Tender. After the issuance of the provisional award letter, the Appellant and the Respondent went on with negotiations on various clauses of the Agreement.

The learned counsel for the Appellant submitted that when negotiations were still on going, the Appellant received a letter from the Respondent dated 30th March 2023, indicating that the Respondent considered the Appellant to have withdrawn from the Tender process for failure to sign the Agreement within the prescribed period. The Appellant submitted that it never withdrew from the Tender process. Further that the Appellant and the Respondent were still in negotiations on various clauses relating to the Agreement.

According to the learned counsel the draft Agreement contained several clauses that were not commercially viable for the Appellant to proceed with the signing of the Agreement. Some of the clauses that were under the

discussion with the Respondent included Government guarantee, voluntary termination by the Respondent and dispute settlement.

The learned counsel stated that the Appellant and the Respondent had several clarification meetings on the referred clauses. The last meeting was held on 24th February 2023, whereby it was agreed, amongst other things, that the Appellant should paraphrase the wording of the arbitration clause. The Respondent committed itself to consult the Ministry of Finance with respect to the Government guarantee. The Respondent also undertook to consult with the Attorney General's office on the dispute settlement clause.

The learned counsel submitted that, while the Appellant was waiting for the Respondent to share a copy of final version of the Agreement that would include the revised clauses on the pending issues, it was surprised to be notified through a letter dated 30th March 2023, from the Respondent that it had withdrawn from the Tender for failure to sign the Agreement.

The learned counsel elaborated that, after receipt of the Respondent's letter on 3rd April 2023, the Appellant wrote a letter to the Respondent indicating its willingness to proceed with the envisaged project. However, the Respondent through a letter dated 11th April 2023, maintained its position.

The learned counsel submitted that the Appellant has never been issued with the final version of the Agreement to be considered to have refused to sign it. The Appellant added that it was still in the process of looking for the financiers of the project whereby some of the pre-requisite conditions were the clauses under discussion that would make the project

commercially viable. The learned counsel submitted that the Appellant is ready to proceed with Tender process upon being issued with the final version of the Agreement that has positively considered the Appellant's concerns.

Regarding Section 4.11.2 of the RFP, the learned counsel submitted that the said section could only be invoked once the Appellant had received the final version of the Agreement and declined to sign. In the instant matter the final version of the Agreement has not been shared by the Respondent. The Appellant should have been given an opportunity to be heard before the Respondent concludes that the Appellant withdrew from the Tender. The right to be heard would have been provided through the issuance of the final version of the Agreement. Therefore, the Respondent's act of unilaterally deciding that the Appellant had withdrawn from the bidding process is unfair.

Finally, the learned counsel prayed for the following orders:-

- i. The Respondent's letter dated 30th March 2023 intending to remove the Appellant from the Tender process be cancelled and the Respondent be compelled to provide responses to all the issues discussed and agreed in the meeting held on 24th February 2023.
- ii. The Respondent be compelled to issue the final draft of the Agreement.

REPLY SUBMISSIONS BY THE RESPONDENT ON MERITS

Ms. Domina Madeli, commenced the Respondent's submissions by pointing out that the Tender was a solicited one under the PPP Act. In this kind of tender, the Respondent designed, developed a feasibility study and secured approval from the Public Private Partnership Steering Committee (**"PPP Steering Committee"**).

The Appellant was one of the tenderers who successfully participated in the Tender. Prior to submission of bids, the tenderers were issued with the RFP. The RFP was accompanied by a draft Agreement. According to the RFP a tenderer cannot submit its bid before is satisfied that the terms and conditions in the draft agreement are favourable and the project is commercially viable. Section 4.6.1 read together with Section 4.11 of the RFP provide opportunity to all potential tenderers to submit two (2) rounds of up to ten (10) comments concerning the draft Agreement within a specified time and date and prior to the deadline for submission of proposals.

Accordingly, the Appellant seized this opportunity and submitted its comments mainly on financial and Government guarantee which were all responded to by the Respondent. The Respondent also conducted pre-bid meetings with tenderers. Therefore, when the Appellant decided to participate in the Tender, was aware of all the terms and conditions of the draft Agreement. Bid submission by the Appellant means that it accepted all the terms and conditions in the draft Agreement, the Respondent insisted.

The Appellant was awarded the Tender subject to negotiations. The negotiations successfully took place on 17th and 18th June 2022. The resolutions on the negotiations' meetings were then tabled to PPP Steering Committee for approval. The PPP Steering Committee approved the resolutions and a final version of the Agreement was prepared incorporating all the terms and conditions agreed during the negotiations.

After completion of internal processes, a provisional award letter was issued to the Appellant on 29th August 2022. Through a letter dated 31st August 2022, the Appellant was invited for contract signing ceremony scheduled on 5th September 2022.

Surprisingly, having received the provisional award letter and invitation for the signing ceremony, the Appellant raised four issues on the draft Agreement relating to Government guarantee, voluntary termination, dispute settlement and operational costs. The Appellant asked for a positive consideration of the raised issues, prior to the signing of the agreement as they were key for a commercially viable project. According to the Respondent these were completely new issues after successful negotiations meetings which were held on 17th and 18th June 2022. The Respondent also contended that the raised issues were not in accordance with Section 4.6.1 of the RFP.

Considering that the Appellant was the only successful bidder remaining, the Respondent opted to consider the newly raised issues. Owing to the limited time available to deal with the raised issues prior to the expiry period of signing of the Agreement, the Respondent also decided to

A handwritten signature in black ink, appearing to be a stylized 'N' followed by a flourish.

extend the time for signing of the Agreement for a further period of ninety (90) days from 29th November 2022 to 27th February 2023.

The Appellant's raised concerns were considered in a clarification meetings convened on 14th and 15th November 2022 as well as 24th February 2023. In all these meetings several issues were discussed, and the final position of the Respondent on the Appellant's raised issues was made in a meeting held on 24th February 2023. In that meeting it was agreed, among other things, that voluntary termination clause would be removed from the Agreement; that the Appellant would submit a draft of the paraphrased arbitration clause; that the Respondent would provide the Government guarantee from the Ministry of Finance; and that the operational costs would remain at TZS 5,673.00 per kilometer.

The Respondent submitted that on 25th February 2023, it received a draft of the proposed arbitration clause from the Appellant. Surprisingly, the proposed arbitration clause stated that any dispute shall be determined under the rules of the International Center for Settlement of Investment Disputes or any bilateral or multilateral agreement on investment protection entered by the Government of the United Republic of Tanzania and the Government of the United Arab Emirates. The Respondent contended that, the Appellant had already been informed through various meetings that since the contract is governed by the PPP Act, Section 22 of the said Act provides that arbitration should be conducted by judicial bodies or organs established in the United Republic of Tanzania and in accordance with laws of Tanzania. The Respondent stated further that, the Appellant was aware that the international rules on arbitration were

inapplicable, unless the PPP Act is amended. The amendment of the PPP Act is not within the Respondent's mandate.

In the cause of considering the proposed arbitration clause, on 27th February 2023, the Respondent received yet another new condition from the Appellant. This one changed the agreed operational costs from TZS 5,673.00 to TZS 5,936.00 per kilometer. The Respondent submitted that upon receipt of the Appellant's proposal on arbitration clause and the changed operational costs (price), it finally concluded that the Appellant was not ready to sign the Agreement despite several efforts made to accommodate the raised issues.

Meanwhile the time for signing the Agreement expired on 27th February 2023. In the circumstances, the Respondent invoked Section 4.11.2 of the RFP and informed the Appellant that having failed to sign the Agreement within the prescribed time, it was accordingly considered to have withdrawn from the Tender process.

The Respondent elaborated that the Appellant's refusal to sign the Agreement has been established from its conducts as every time after having a clarification meeting the Appellant brought new issues over and above what had already been agreed by the parties.

The Respondent insisted that the Appellant was accorded the right to be heard in compliance with the principles of natural justice. That was well demonstrated by the Respondent's act of positively considering all the issues raised by the Appellant which were within its mandate. The Respondent also extended the period for signing of the Agreement to pave

way to deliberate on the issues raised by the Appellant. Yet, the Appellant kept on raising new issues clearly demonstrating that it was not ready to sign the Agreement.

Finally, the Respondent prayed for the following orders:-

- i. The Respondent's letter dated 30th March 2023 should continue to be in force.
- ii. The Appeals Authority declares that the Appellant withdrew from the Tender process.

ANALYSIS BY THE APPEALS AUTHORITY

2.0 Whether the Appellant withdrew from the Tender process.

In order to ascertain the validity of the parties' contentions on this issue, the Appeals Authority revisited the sequence of events from the date the Appellant was invited to sign the Agreement to the date the Respondent informed the Appellant that it has withdrawn from the Tender process.

On 31st August 2022, the Respondent invited the Appellant for the signing of the Agreement slated for 5th September 2022. The Appellant was also required to submit a revised financial model following the fluctuation of the diesel price in the world market.

On 16th September 2022, the Appellant submitted to the Respondent a proposal for amendments of clauses relating to contract termination and dispute resolution. On 26th October 2022, the Respondent once again invited the Appellant for signing of the Agreement. The signing ceremony was scheduled on 31st October 2022. On 27th October 2022, hardly four (4)

days before the signing ceremony date, the Appellant sought for the Respondent's decision on the final price to be awarded, revolving bank guarantee, Respondent's voluntary termination and acceptance of international arbitration clause.

In considering the issues raised by the Appellant through a letter dated 27th October 2022, the Respondent convened a clarification meeting with the Appellant which took place on 14th and 15th November 2022. In the said meeting no consensus was reached. Hence, it was agreed that further research should be done.

Following the clarification meeting held on 14th and 15th November 2022, the Respondent through its letter dated 15th November 2022, asked the Appellant to submit its financing arrangements in relation to the project. The Appellant through a letter dated 21st November 2022 responded to the Respondent's letter by informing it that, the Appellant's financiers demands several commitments like payment guarantee, borrower's corporate guarantee and confirmation on the interest rate before committing themselves to finance the project. Since some of the issues raised by the financiers were yet to be settled between the Appellant and the Respondent, the Appellant was unable to finalize the financing arrangement with its financiers. Furthermore, the Appellant reminded the Respondent to finalize the pending issues as discussed in the meeting of 14th and 15th November 2022.

In an effort to allow the parties to deal with pending Issues, the Respondent through a letter dated 27th November 2022 extended the time for signing of the Agreement for a further period of ninety (90) days from

30th November 2022 to 27th February 2023. This was due to few days that remained before the expiry of the initial ninety (90) days.

On 7th February 2023, the Respondent invited the Appellant again for signing of the Agreement set on or before 27th February 2023. The Appellant was also required to submit its financing arrangements before the signing of the Agreement. On 13th February 2023, the Respondent wrote another letter to the Appellant inviting it for further clarifications if there were still some issues that were to be discussed before the signing of the Agreement.

The record of Appeal indicates further that, on 22nd February 2023, the Respondent invited the Appellant to attend a clarification meeting scheduled on 24th February 2023. In the said clarification meeting, parties agreed that the Appellant should paraphrase the arbitration clause and the Respondent should seek the opinion of the Attorney General on the same. Furthermore, it was agreed that the voluntary termination clause would be removed from the Agreement. It was also agreed that the Respondent should provide Government guarantee from the Ministry of Finance and that the operational costs should remain at TZS 5,673.00 per kilometer.

On 25th February 2023, the Appellant submitted its proposal in relation to dispute resolution which included a recommendation that in the event of a dispute, parties should refer the matter to Arbitration under the rules of International Centre for Settlement of Investment Disputes or within the framework of any bilateral or multilateral agreement on investment protection entered by the United Republic of Tanzania and the Government of the United Arab Emirates. The record of Appeal indicated further that,

the Appellant through a letter dated 27th February 2023, notified the Respondent on a new contract price from the earlier agreed price of TZS 5,673.00 to TZS 5,936.00 per kilometer.

Following the changes introduced by the Appellant in the contract price and the proposal for the inclusion of the international arbitration clause and that the period for signing of the Agreement had expired; on 30th March 2023 the Respondent notified the Appellant that it has withdrawn itself from the Tender process.

From the above sequence of events and parties' submissions it is undisputed that the Tender was conducted pursuant to the PPP Act and the PPP Regulations. It is further undisputed that the Appellant was issued with a provisional award letter and later on was invited for signing of the Agreement.

The Appeals Authority observed that much as the Appellant was invited for the signing of the Agreement and before the signing took place there were several correspondences between the parties that led the Respondent to convene clarifications meetings. In the clarification meeting held on 24th February 2023, the parties reached a consensus on matters relating to voluntary termination, Government guarantee and operational costs (contract price). The only pending item was in relation to paraphrasing of an arbitration clause by the Appellant.

On 25th February 2023, the Appellant submitted a proposed arbitration clause that reads as follows:-

"if negotiations fail, parties should refer the matter to Arbitration under the rules of International Centre for Settlement of Investment Disputes or within the framework of any bilateral or multilateral agreement on investment protection entered into by the United Republic of Tanzania and the Government of the United Arab Emirates."

It is evident that through a clarification meeting held on 14th and 15th November 2022 and the Respondent's clarifications issued as an annexure to a letter dated 7th February 2023, the Appellant was informed that the project is regulated by the PPP Act. Section 22 of the PPP Act provides that mediation or arbitration should be conducted by judicial bodies or other organs established in the United Republic of Tanzania and in accordance with the laws of Tanzania. In compliance with the PPP Act, Section 1.10 of the RFP has the same wording as provided under Section 22 of the PPP Act. Section 22 of the PPP Act and Section 1.10 of the RFP read as follows:-

"22 Any dispute arising during the course of the Agreement shall-

- (a) be resolved through negotiation; or*
- (b) in the case of mediation or **arbitration be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania.**"*

"1.10 In the event that any dispute arising out of or in

connection with this Agreement has not been resolved in mediation, in accordance to paragraph 1.1 to 1.9, the parties agree to submit the matter to arbitration to be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania."

Based on the above quoted provisions, the Appeals Authority finds that the requirement of the law in relation to arbitration clause is clear. The Appeals Authority is satisfied that the position of the law was known to the Appellant as it was included in the RFP. It was also clarified through clarification meetings between the Appellant and the Respondent. In any case ignorance of the law is no defense.

In view of the above, the Appeals Authority agrees with the Respondent that the international arbitration rules proposed by the Appellant could not be incorporated in the Agreement without amending the PPP Act. Therefore, the Appeals Authority is of the settled view that had the Appellant intended to sign the Agreement it would not have proposed an arbitration clause that contravenes Section 22 of the PPP Act.

The Appeals Authority further considered the Appellant's proposal on the adjustment of the price contrary to what was agreed during the clarification meeting held on 24th February 2023. At the said meeting the agreed price was TZS 5,673.00 per kilometer. Through a letter dated 27th February 2023, the Appellant unilaterally increased contract price to TZS

5,936.00 per kilometer. According to the sequence of events above given, the Appeals Authority finds that since the price was already agreed by the parties, the matter was settled. Changing the price on the last day of the extended term of signing of the Agreement demonstrated further that the Appellant intended to call for yet another discussion.

In addition to price change, the Appellant also made another condition through a letter dated 27th February 2023 that it would only sign the Agreement if the Respondent agrees to the inclusion of the proposed international arbitration clause in the final version of the Agreement. In the Appeals Authority's view this condition is yet another demonstration of the Appellant's intention not to sign the Agreement.

The Appeals Authority revisited Section 4.11.1 of the RFP which requires the Agreement to be signed within ninety (90) days from the date a winning tenderer is invited for signing. The provision further allows the Respondent to extend the time in the event the signing could not take place within the specified period. Section 4.11.1 reads as follows:-

"4.11.1 The Winning Bidder shall receive an invitation from the Agency with the aim to sign the Service Agreement. The Service Agreement shall be signed within 90 (ninety) days following the date of issuance of the invitation to the Winning Bidder in a form and substance which is conform to the Service Agreement (Draft). No substantial amendments to the Service Agreement (Draft) shall be permitted at this stage. The Agency retains the

right, in its absolute discretion, to extend the term for signing of the Service Agreement."

(Emphasis supplied)

On 31st August 2022 the Appellant was invited for the signing of the Agreement. The signing was to be effected within ninety (90) days from the date the Appellant was invited. Counting from 31st August 2022 the signing ought to have taken place by 29th November 2022. The record of appeal indicates further that the signing could not take place due to several clarification meetings that were going on between the parties. In view of that, the Respondent through a letter dated 27th November 2022 had to extend the time for signing of the Agreement for a further period of ninety (90) days effective from 30th November 2022 to 27th February 2023. Despite the extension, the parties were unable to sign the Agreement.

The Appeals Authority revisited Section 4.11.2 of the RFP which reads as follows:-

"4.11.2 If the winning Bidder does not sign, formally and in content, the Service Agreement within the timeframe set by the Agency, such Bidder shall be considered to have withdrawn from the bidding process."

(Emphasis supplied)

The above quoted provision entails clearly that if the successful tenderer fails to sign the Agreement within the specified timeframe the same would be considered to have withdrawn from the Tender process.

The learned counsel for the Appellant strongly argued that it was not served with the final version of the Agreement before was considered to have failed to sign it and consequently to have withdrawn from the Tender process. It is not disputed that, the RFP contained the draft Agreement. It means therefore when the Appellant submitted its bid was aware of the terms and conditions of the Agreement. The Appellant after being invited for signing of the Agreement raised several issues.

Through a letter with Ref. No. RDEXT-OD 464 dated 27th October 2022, the Appellant requested the Respondent to avail it with the final draft Agreement which includes approval of the pending issues relating to:- final price to be awarded, revolving bank guarantee, termination clause adjustment and acceptance of international arbitration clause. In the said letter the Appellant insisted that it would be willing and available for the signing of the Agreement if the raised issues are considered positively in the final version of the Agreement.

Furthermore, the Appellant through a letter with Ref. No. RDEXT-OD 503 dated 21st November 2022, the Appellant requested the Respondent to consider issues relating to revolving bank guarantee, removal of the Respondents voluntary termination clause and insertion of an international arbitration clause. The Appellant insisted in that letter that once the three issues above have been considered positively and inserted in the final version of the Agreement it would be ready for the signing of the Agreement.

The Appellant's letter with Ref. No. RDEXT-OD 596 dated 27th February 2023, emphasized its position that it would not proceed with the signing of

the Agreement until the international arbitration clause is included in the final Agreement. In the said letter the Appellant also changed the agreed contract price.

From the above narration, it appears to the Appeals Authority that the Appellant has been consistently insisting that unless the raised issues are positively considered and inserted in the final version of the Agreement it would not sign it.

Based on this observation, the Appeals Authority is of the view that, the Appellant's act of insisting on the inclusion of the international arbitration clause despite being aware of the requirement of Section 22 of PPP Act and its act of changing the agreed contract price on the date that was the deadline for signing of the Agreement, indicates that it intends to have un-ending discussion on the raised issues. Therefore, the final Agreement which contained the international arbitration clause and the new contract price could not be realized and shared to the Appellant for signing. In the circumstances, the Appeals Authority finds that the Respondent rightly invoked Section 4.11.2 of the RFP by considering the Appellant to have withdrawn from the Tender process.

Given the above findings, the Appeals Authority concludes the second issue in the affirmative that the Appellant withdrew from the Tender process.

3.0 What reliefs, if any, are the parties entitled to?

Taking cognizance of the findings made in the second issue hereinabove, the Appeals Authority hereby dismiss the Appeal in its entirety.

It is so ordered.

This decision is binding and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the parties.

This decision is delivered in the presence of the parties this 24th day of May 2023.

ADVOCATE ROSAN MBWAMBO


.....

Ag. CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO.....

2. DR. WILLIAM KAZUNGU.....

